

Internal Revenue Service
memorandum

CC:INTL-0344-91
Br1:RACadenas

date:

JUN 27 1991

to: Myrna Smith, Group Manager Examination Division
Group No. 2306, Stockton, California

from: Chief, Branch No.1
Associate Chief Counsel (International) CC:INTL:1

subject: Taxpayers: [REDACTED]

THIS DOCUMENT INCLUDES STATEMENTS SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE. THIS DOCUMENT SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE IRS, INCLUDING THE TAXPAYERS INVOLVED, AND ITS USE WITHIN THE IRS SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW THE DOCUMENT FOR USE IN THEIR OWN CASES.

ISSUE: Whether children of parents who have been granted "amnesty" by the I.N.S may be claimed as dependents under I.R.C § 152?

This is in response to your office's memorandum dated April 22, 1991. Rick Cadenas of our office has discussed this matter at various times with Gary Menzies, an examiner within your office. We have been informed that the above taxpayers' cases are representative of numerous other cases within your district in which a taxpayer (formerly an illegal alien) who has qualified for "amnesty" under the immigration law¹ of the

¹ The so-called immigration "amnesty" provisions are contained in the Immigration Reform and Control Act of 1986 ("IRCA"); (Section 245A of the Immigration and Nationality Act, 8 U.S.C. § 1255a, as amended), which provides that certain illegal aliens who can show that they were physically present in the U.S. prior to a given date specified in the statute, may qualify for "legalization", leading to the granting of a "green card" (I.N.S. Form I-551) to such individual. The legalized family member's qualification for U.S. residency, however, does not automatically result in the qualification of such individual's spouse and children for U.S. residency. See: MacDonnell v. U.S. 693 F. Supp. 1439. (S.D.N.Y., 1983).

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United States, is attempting to claim dependency exemptions under I.R.C. § 152 for his (or her) spouse, children or other relative. In these cases, the persons being claimed as "dependents" do not have green cards, and are not permanent residents or citizens of the United States.

You have asked whether it is necessary to further analyze the I.N.S. "residency" status of the taxpayer's relative who, despite not having a "green card", is claimed as an exemption on the taxpayer's income tax return. In order to qualify as a dependent, an individual must be a "resident" under I.R.C. § 152(b)(3), which states as follows:

"The term dependent does not include any individual who is not a citizen or national of the United States unless such individual is a resident of the United States or of a country contiguous² to the United States.*" [Emphasis added].**

We believe that in applying I.R.C. § 152(b)(3), reference must be made to the definition of a "resident alien" contained in § 7701(b)(1)(A) and the regulations thereunder, which treat individuals meeting the residency tests contained therein as residents of the United States for tax purposes. You have advised us that you are aware of the "green card" and "substantial presence" tests referenced in § 7701(b)(1)(A)(i) and (ii), and therefore it is not necessary to restate the applicable rules in detail in this memorandum.

In general, if an alien individual does not have a "green card"³ and has not otherwise been accorded permanent residence status within the meaning of I.R.C. § 7701(b)(1)(A)(i), then such individual must meet the "substantial presence test" under I.R.C. § 7701(b)(3) in order to qualify to be claimed as a dependent. The application of the statutory tests may require proof of whether the claimed dependent was physically present

¹(...continued)

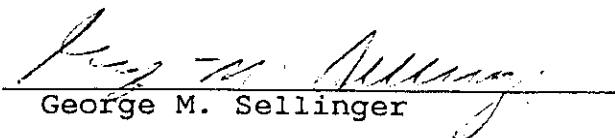
Spouses and children of a resident alien, however, are given an immigration preference under 8 U.S.C. § 1153 (a)(2), and must qualify independently under said provision in order to become U.S. residents for purposes of the immigration law.

²The countries "contiguous" to the United States are Canada and Mexico, and it has been indicated that the taxpayers who are subject of your inquiry are principally from non-contiguous countries in Central America and Asia.

³See: Prop. Treas. Reg. 301.7701(b)-1(b).

within the United States for the requisite 183 days in a given year, or the cumulative average of days within a three year period as provided in I.R.C. § 7701(b)(3)(B). An individual who is was present in the United States less that 31 days in any given year would generally not qualify as a U.S. resident by reason of I.R.C. § 7701(b)(3)(A)(i), and therefore would not qualify as a dependent under I.R.C. § 152(b)(3).

Please contact Rick Cadenas at 287-4851 if you wish to discuss this matter.


George M. Sellinger